SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1121

UNITED STATES LINES, INC., *Petitioner*,

v.

JOHN SHELLMAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES LINES, INC., *Petitioner*,

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JOHN SHELLMAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner United States Lines, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, made and entered in this proceeding on November 21, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court, reported at 1975 A.M.C. 362, also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 21, 1975. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction pursuant to 28 U.S.C. §1332. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291.

QUESTIONS PRESENTED

1. Is the 1972 addition of Subsection 905(b) to the Longshoremen's and Harbor Workers' Compensation Act to be construed as requiring a vessel owner to pay 100% of the total damage suffered by an injured longshoreman regardless of the minor degree of the shipowner's negligence and permitting the injured longshoreman's stevedore company employer to recover its compensation expenditures pursuant to the Act in full, even though the stevedore's negligence was predominantly responsible for the injury?

2. Is the apparent internal inconsistency of the new Subsection 905(b) of the Longshoremen's and Harbor Workers' Compensation Act to be resolved in a manner which does equity among longshoreman, shipowner and stevedore and if so, what rule would best do equity?

STATUTORY PROVISION INVOLVED

Longshoremen's and Harbor Workers' Compensation Act — Exclusiveness of Liability [33 U.S.C. §905, as amended Oct. 27, 1972, Publ. L.92 — 576, §18(a), 86 Stat. 1263]:

"(a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of

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kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

"(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Chapter."

STATEMENT OF THE CASE

Pursuant to the 1972 addition, respondent brought suit in the United States District Court for the Central District of California against petitioner for damages because of personal injuries allegedly caused by petitioner's negligence while respondent was working as a longshoreman for Marine Terminals Corporation on board petitioner's vessel AMERICAN AQUARIUS. Federal jurisdiction was based on diversity of citzenship. Petitioner denied negligence and defended affirmatively on the grounds that the injury was caused wholly or in part by respondent's contributory negligence and wholly or in part by the negligence of his employer Marine Terminals Corporation, that as a result any recovery enjoyed by him must be reduced, and that his employer was not entitled to recover payments made to or on behalf of him pursuant to the Longshoremen's and Harbor Workers' Compensation Act.

Marine Terminals Corporation through its compensation underwriters Hartford Accident and Indemnity Co. filed a complaint in intervention alleging that it had paid to or on respondent's behalf benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act and that further payments were anticipated, and claiming "a lien" on any judgment or settlement in the amount of its payments. Petitioner answered the complaint in intervention, denying its allegations and alleging as an affirmative defense that contributory negligence of petitioner and negligence of Marine Terminals Corporation required a reduction or elimination of any stevedore recovery.

Various pretrial motions resulted in an opinion of the court, reproduced in the appendix. In pertinent part, the trial court held that under the 1972 addition to the Longshoremen's and Harbor Workers' Compensation Act (1) respondent had a cause of action triable by jury for his claimed injuries caused by the negligence of petitioner, (2)

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Marine Terminals Corporation and its underwriter could not pursue the claim for compensation benefits on a "lien" theory but that any action to recover compensation expenditures must arise on a common law tort theory to which might be interposed the common law defense of contributory negligence, and (3) in respondent's action against petitioner, petitioner may claim the contributory negligence of respondent and also the negligence of Marine Terminals Corporation as concurring causes in reducing any damages respondent may be shown to have suffered as a result of the accident. The trial court ordered the stevedore's complaint in intervention stricken, and it did not seek to amend.

The case went to trial with full participation by the stevedore in order to avoid retrial in the event of reversal on appeal. At the conclusion of its deliberations, the jury answered special interrogatories. It found that petitioner was negligent, that respondent's total damages were $15,485, that respondent was not guilty of contributory negligence and that negligence of Marine Terminals Corporation was a seventy percent proximate cause of the accident. The trial court entered a judgment in favor of respondent and against petitioner for thirty percent of $15,485, or $4,645.50.

Respondent and the stevedore appealed but petitioner did not. The record in the Court of Appeals consisted of an agreed statement. After briefs were filed, the stevedore moved to withdraw its appeal. The Court of Appeals reversed the judgment of the District Court insofar as it reduced respondent's judgment and held that the shipowner was required to pay him all of the $15,485 even though another party's negligence was a cause of seventy percent of his damages. The Court of Appeals allowed the stevedore to withdraw its appeal but stated nevertheless that the stevedore's claim against the shipowner for

reimbursement of its compensation benefits should not be reduced in proportion to its own negligence.

This is a companion case to *Dodge v. Mitsui Shintaku Ginko K. K. Tokyo*, Ninth Circuit No. 75-1442, in which a Petition for a Writ of Certiorari has been filed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been but Should be Settled by This Court.

The questions presented are vitally important to American stevedoring companies and to American and foreign shipping companies whose vessels call at American ports. Hundreds of lawsuits have been filed and are pending which are governed by the completely new section of the Longshoremen's and Harbor Workers' Compensation Act. In many of these cases, the shipowner is defending in part on the basis that the longshoreman's injury was caused totally or in part by his stevedore employer's negligence. In most of these cases, the stevedore or its workmen's compensation underwriter claims recovery of compensation expenditures regardless of the stevedore company's negligence. Resolution of the questions presented here will have significant impact on and wide-ranging effect in the maritime industry. The questions raised have been discussed directly or as dicta and ruled on by many lower courts with varying results.[1]

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1. In addition to the case at bar, petitioner's counsel knows of *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, No. 75-1442, ... F.2d ... (9th Cir. November 21, 1975); *Croshaze v. Koninklijke Nedlloyd*, 398 F. Supp. 1224 (D. Ore. July 31, 1975); *Hubbard v. Great Pacific Shipping Co.*, Civil No. 74-289 ... F.Supp. ... (D. Ore. June 16, 1975); *Santiago v. Liberian Distant Transports, Inc.*, Civil No. 524-73C2 ... F.Supp. ... (W.D. Wash. June 2, 1975); *Kroft v. Nedlloyd & Hoegh Line*, No. 73-306-AAH ... F.Supp. ... (C.D. Calif. 1975); *Sanaduroff v. Hanseatic/Vassa Line*, No. 74-1122 ...F. Supp. ... (N.D. Cal. 1975); *Frasca v. Prudential Grace Lines Inc.*, 1975 A.M.C. 1130, 43-45 (D. Md. 1975); *Wilson v. I/S*

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Resolution of the questions presented here also is important because the decision of the court below appears to frustrate the intent of Congress in enacting Subsection 905(b), as shown by the legislative history of the 1972 amendments. The House Report states that:

> "[A] vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act [citations] for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work [citations] for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore [citations] . . . . " [House Report No. 92-1441 at 6; 3 U.S. Code Cong. and Admin. News 4700, 4703-4 (1972). The Report prepared by the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare is identical. Senate Report 92-1125.]

The Committee history notes that the 1972 addition of Subsection 905(b) was intended to reject "the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel . . . . [T]he vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which were really the fault of the stevedore . . . ." House Report No. 92-1441 at 4, 7; 3 U.S. Code Cong. and Admin. News at 4702, 4704 (1972).

Viking Car Carriers, Los Angeles County Superior Court No. SOC 31018 (1975). Law review articles have discussed the issues at length. Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation*, 19 N.Y.L.F. 587 (1974); Coleman and Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 35 Md. L. Rev. 351 (1976).

In light of this legislative history, the provision in Subsection 905(b) that

> "In the event of injury to a person . . . caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel . . . ."

must be read to limit the damages an injured longshoreman can recover from a vessel to that portion of his total damages caused by vessel negligence.

The decision of the court below not only frustrated the evident intent of Congress, but also failed to acknowledge that the issues in the case were controlled by Subsection 905(b), failed to engage in the textual analysis necessary to construe the provision, and, in fact, did not analyze the question of the meaning of Subsection 905(b), even though that issue was extensively briefed and argued. Instead, the court below treated the matter as controlled by court decisions prior to the new section while only indirectly even acknowledging its existence.

The problem of construing Subsection 905(b) calls for an analysis of the phrase 'caused by the negligence of a vessel' as it appears in the first three sentences of the statute. A plain reading of Subsection 905(b), uncomplicated by the issues raised by this case, indicates that the drafters of the provision sought to provide an injured longshoreman or other covered person with a cause of action against a vessel owner whose negligence caused his injuries. The second and third sentences of this subsection contemplate a situation wherein the vessel owner also is the direct employer of longshoremen and other harbor workers. Those sentences limit the remedies of an injured longshoreman or harbor worker against the vessel owner to compensation payments under the Act when the vessel's liability for the injury stems from its status as the employer of longshoremen and other harbor workers.

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The court below stated at page seven of its opinion that, "because the shipowner's negligence was a concurring cause in producing the longshoreman's injuries, the shipowner is liable for the total of the plaintiff's damages." To reach the decision of the court below that an injured longshoreman's recovery from a negligent vessel owner will not be reduced by the percentage of employer negligence, the court must interpret the first sentence of Subsection 905(b) to provide that the vessel owner is liable for the total amount of damages for injuries to a longshoreman to any extent "caused by the negligence of a vessel."

If the phrase in question in the second and third sentences of the statute were read in the same manner, it would destroy an injured longshoreman's third-party action against a negligent vessel owner in all cases where his injuries were to any extent "caused by the negligence of persons engaged in providing" stevedore, shipbuilding or repair services to the vessel. Such a construction, however, would make the availability of a third-party action against the vessel owner dependent upon the fortuitous circumstance whether the plaintiff was employed by an independent contractor or was a direct employee of the vessel owner.

In order to prevent this anomalous result, the first sentence may (and should, we submit) be read to grant recovery from the vessel owner *to the extent* the injuries were caused by him, and the second and third sentences read to bar recovery from the employer only *to the extent* "the injury was caused by the negligence of persons engaged in providing" services to the vessel.

The words of the statute offer no clear guidance as to its proper construction. The decision of the court below forces a choice between two undesirable alternatives in

construing the statute. If the aim is to have a statute which is logical and internally consistent, it results in a situation wherein one class of employees is prevented from suing the vessel owner while another class of employees under the same circumstances would have such a right. If the aim were to provide a remedy in the second and third sentences more in keeping with the plain meaning of the words of the statute, the phrase "caused by the negligence of" a vessel or persons must be read differently depending upon its location in the statute.

Petitioner's argument in the court below would have resulted in a construction of the statute that was both internally consistent and in accord with the plain meaning of the statute. The court below never confronted this problem of interpretation which is central to any attempt to construe the statute. Third party lawsuits under the second and third sentences of §905(b) have appeared. See, e.g., *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975). This Court's resolution of the issues presented by this cause will therefore affect all longshoremen and harbor workers, not just those employed by independent contractors. The fact that this Court authoritatively decides the question is certainly of equal importance to whatever construction of the statute it ultimately adopts.

(2) The Decision of the Court of Appeals Herein Conflicts With Decisions of other Courts of Appeals on the Same Matter.

In *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968), the District of Columbia Court of Appeals reached a conclusion identical in principle to that repudiated herein by the court below when it allowed a third-party tort-feasor to reduce the plaintiff's judgment because of employer negligence. The court in *Murray* construed the exclusivity provision of the Federal Employees' Compensation Act to end the common law liability of the federal employer and

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preclude a tort-feasor held liable to a federal employee from obtaining contribution from the government. The rationale was that the exclusivity provision prevented the government from being a joint tort-feasor, a prerequisite to liability for contribution under the common law of the District of Columbia. The court found support in an opinion of the Second Circuit Court of Appeals similarly construing the nearly identical exclusivity provision of the Longshoremen's and Harbor Workers' Compensation Act, which covers private employees in the District of Columbia.

The *Murray* court "mitigated" any inequity resulting from the denial of contribution by holding that, if the facts established that the third-party tort-feasor would have been entitled to contribution from the government employer had the statute not interposed a bar, any damages recoverable from the third-party were limited to one-half of the total damages sustained by the plaintiff. This was a consequence of a rule in the District of Columbia that in order to protect a joint tort-feasor from having to pay more than its fair share of the total damages, a plaintiff who settled a claim against one joint tort-feasor was limited to recovery of fifty percent of his damages from the remaining joint tort-feasor at trial. The *Murray* court likened the receipt of compensation benefits under the FECA to a settlement of the plaintiff's claim because it provided him with the assurance of compensation for his injuries, and held that the third-party tort-feasor could reduce his liability by fifty percent just as if the government employer were a joint tort-feasor.

The District of Columbia Circuit Court of Appeals extended the *Murray* rule to the Longshoremen's and Harbor Workers' Compensation Act in *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972). The court interpreted the *Murray* reduction of a plaintiff's damages on grounds of employer negligence to apply to all work-

men's compensation cases and assumed without question, as did the parties involved, that it applied to third-party suits brought by injured employees under the Longshoremen's and Harbor Workers' Compensation Act.

Although *Dawson* was decided prior to the enactment of Subsection 905(b), the exclusivity provision which the decision construed is virtually identical to the present exclusivity provision, Subsection 905(a). Subsection 905(b) and its legislative history make clear that the latter section applies to longshoremen, harbor workers and other maritime personnel. However Subsection 905(b) might be interpreted, the meaning of Subsection 905(a) as providing the only remedy against the employer remains unchanged, so the reasoning in *Murray* and *Dawson* similarly should remain unchanged. *See, Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 42 (3rd Cir. 1975).

Should this Court decline to decide the issues presented by this case, not only will there be a conflict between circuits concerning the ability of a third-party tort-feasor to reduce a plaintiff's recovery for injuries caused in part by employer negligence, but the majority of workers covered under the Longshoremen's and Harbor Workers' Compensation Act (the four hundred thousand non-maritime private employees in the District of Columbia whose compensation rights are governed by it) will be subject to a rule of recovery different than that applied to longshoremen and other maritime workers also covered under the Act.

The decision of the Court below also conflicts with the Third Circuit Court of Appeals' interpretation of the second sentence of Subsection 905(b) in *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975). Plaintiff there was a longshoreman who was injured while working aboard a barge. His employer also was the charterer of the barge and in possession and control of the vessel. Plaintiff brought a negligence action against the

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employer charterer for vessel negligence as provided by Subsection 905(b). The district court granted summary judgment for the employer on grounds that plaintiff could not sue his employer, the vessel owner *pro hac vice*, although it recognized that he did have a third-party cause of action against the actual owner of the barge.

The Court of Appeals reversed, finding that the owner *pro hac vice* was a "vessel" as contemplated by the Longshoremen's and Harbor Workers' Compensation Act for purposes of negligence liability, despite the fact that the owner *pro hac vice* was also the employer of the plaintiff. The court held that there were triable issues of fact regarding evidence that the employer's crew foreman observed the defective condition that caused the accident but failed to give warning of the hazard to the longshoremen working in the area. At trial the testimony might establish the stevedore status of the foreman, thus keeping the case from the jury, or it might show that the foreman was not negligent. Implicit in the court's discussion was the conclusion that if neither of those two circumstances were found to be true, the vessel owner *pro hac vice* would be liable in plaintiff's third party action against it.

The opinion then announced the rule that under Subsection 905(b), an employer who is also the vessel owner is "relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own 'owner' occasioned negligence". 521 F.2d at 43. This rule, at most, means that the Third Circuit Court of Appeals has construed the second sentence of Subsection 905(b) to mean that an injured longshoreman who is employed by the vessel has no cause of action against the vessel only if the injury was *to its full extent* caused by the negligence of persons providing stevedore services to the vessel. At the very least it means that the action is barred *to the extent* that the injury was caused by the

negligence of such persons. Both of these interpretations conflict with the construction the Court below placed upon the first sentence of Subsection 905(b) when it held that the vessel owner is liable for all injuries to any extent caused by the vessel's negligence.

(3) The Court of Appeals' Decision Herein Conflicts With Decisions of This Court.

This Court has long been committed to an apportionment of damages rule in admiralty cases and has been equally committed to the principal of equity and fairness. These principals were most recently reaffirmed and expanded in *United States v. Reliable Transfer Co., Inc.*, ... U.S. ...., 44 L.Ed. 2d 251 (1975). There, the Court was required to decide whether the once settled admiralty rule of equal division of damages in collision cases should be replaced by a rule requiring allocation of damages in proportion to the relative fault of each party. The Court had earlier significantly expanded the apportionment of damages rule in personal injury cases. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

In *Reliable Transfer*, the lower court found that grounding of the tanker MARY A. WHALEN was caused twenty-five per cent by the failure of the U. S. Coast Guard to maintain a breakwater light and seventy-five per cent by the fault of the defendant's vessel. In accordance with the old rule in collision cases, however, the trial court found each party liable for one-half of the damages of plaintiff. This Court noted that such a result hardly commended itself to the sense of justice any more appealingly that did the common law doctrine of contributory negligence as a complete bar to recovery. 44 L.Ed. 2d. at 259. The primary policy recognized by this Court was "that a vessel is primarily negligent does not justify its shouldering all responsibility nor excuse the slightly negligent vessel from bear-

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ing any liability at all." *Ibid.* Accordingly, the Court rejected the former "equal fault" rule and adopted the rule requiring allocation of liability for damages in proportion to the relative fault of each party, in order to obtain "just and equitable allocation of damages . . . [a] goal [which] can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible." *Id.* at 262.

United States v. Reliable Transfer points out the most serious deficiency in the decision of the Court of Appeals: it upholds the old common law rule that one of several joint tort-feasors may be required to pay one hundred per cent of an injured's damages, regardless of the percentage of the total damage caused by that tort-feasor's negligence.

CONCLUSION

The decision of the Court of Appeals herein creates a manifest injustice and inequity which would render a shipowner liable for damages resulting from the negligence of others, contrary to the obvious intent of the 1972 amendments to the Longshoremen's and Harbor Worker's Act. Such a result is contrary to decisions of this Court, and a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit herein.

Respectfully submitted,
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By _____
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United States Lines, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN SHELLMAN, *Plaintiff*, vs. UNITED STATES LINES OPERATORS, INC. *Defendant.*	No. CV 73-1902-R MEMORANDUM OPINION AND ORDER

Plaintiff, JOHN SHELLMAN (hereafter SHELLMAN) moves to strike from the answer of defendant UNITED STATES LINES OPERATORS, INC. (hereafter USL) the allegations of its answer setting forth the so-called "Murray Credit" doctrine which permits reduction of plaintiff's recovery by reason of the alleged negligence of plaintiff's employer MARINE TERMINALS CORPORATION (hereafter MARINE).

HARTFORD ACCIDENT AND INDEMNITY COMPANY (hereafter HARTFORD), subrogated to the rights of MARINE; has similarly filed a motion to strike the allegations of contributory negligence in the answer of USL to HARTFORD'S complaint in intervention for recovery of the compensation benefits paid to SHELLMAN for injuries suffered while working as a longshoreman on board USL'S vessel AMERICAN AQUARIUS.

BACKGROUND

In July 1973 USL'S vessel AMERICAN AQUARIUS called at Long Beach for the purpose of onloading cargo vans. On July 4, 1973 SHELLMAN was working on board the AMERICAN AQUARIUS as a member of a longshore gang lashing the cargo vans which had previously been loaded on board.

While engaged in these lashing activities, SHELLMAN was injured and subsequently filed the instant complaint alleging negligence on the part of USL for its failure to furnish the proper gear for the lashing operations.

USL answered denying negligence and raised several affirmative defenses, including the affirmative defense called into question by the present motion i.e., the application of the so-called "Murray Credit" doctrine which admits to the reduction of SHELLMAN'S recovery in light of his receipt of compensation payments from his employer MARINE under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §901 et seq.).

HARTFORD, as the insurance carrier subrogated to the claims of MARINE for payments of compensation to SHELLMAN, has filed a complaint in intervention to recover the compensation payments made to SHELLMAN. In answer to the complaint in intervention, USL has raised as an affirmative defense the alleged contributory negligence of MARINE.

These motions bring before the court as a matter of first impression the impact of the principle of Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968) upon SHELLMAN'S claim, coupled with the impact thereon occasioned by the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 particularly the strictures of §§933(b), 933(e)(1)(3) and 933(e)(1)(e).

LONGSHOREMEN CLAIMS PRE RYAN STEVEDORING., INC. v. PAN-ATLANTIC STEAMSHIP CORP.[1]

The enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927 provided exclusive remedies for the recovery of compensation from his employer for injuries sustained by a longshoreman. The exclusivity of

1. 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956).

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the remedy imposed by the Act was clarified in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) in which the Supreme Court extended the right of a longshoreman to sue the owner of a vessel on which he was working not only for negligence but also for breach of warranty of seaworthiness.

Unresolved by *Sieracki* and precipitated by the increasing number of actions by longshoremen against ship owners the Supreme Court in Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952) addressed itself to the ability of a shipowner to recover from the employer of an injured longshoreman for injuries aboard his vessel caused solely by or with the concurrence of some, negligence on the part of the employer. Rejecting the invitation to extend the doctrine of comparative fault applied in admiralty collision cases to personal injury cases, the court concluded

> . . . because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so. *Id.* at 287, 72 S.Ct. at 280-81, 96 L.Ed. at 321.

Persisting in their attempts to shift or share the burden of ship board injuries of longshoremen to their employers, shipowners continuedly endeavored to obtain contribution from a longshoreman's employer found by the jury to be guilty, together with the ship owner, of negligence proximately causing the longshoreman's injuries.

Pope & Talbot, Inc. v. Hawn, 346 U.S. 496, 74 S.Ct. 202, 98 L.Ed. 143 (1953) clarified two principles applicable to longshoremen's[2] ship board injuries.

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2. Although Hawn was not technically a longshoreman the Court proceeded upon the theory that the type of work being performed and not the name given to the workman's position was controlling. In so concluding the Court then applied admiralty principles of seaworthiness and negligence.

1. The doctrine of comparative negligence was adopted for uniform application in cases brought by longshoremen as well as seamen for ship board injury actions (maritime torts). *Id.* at 409, 74 S.Ct. at 304-05, 98 L.Ed. at 150-51.

2. The recovery of a longshoreman could not be reduced by the payment of compensation[3] received from the employer nor could the employer be compelled (even if negligent) to contribute by direct action against the employer or by reduction of compensation payments made from the employee's recovery otherwise subject to recoupment under §33 of the Longshoremen's and Harbor Workers' Compensation Act.[4] *Id.* at 412-413, 74 S.Ct. at 206-07, 98 L.Ed. at 152-53.

Such was the law of contribution in admiralty cases until 1956.

THE ALTERATION OF THE LAW ACCOMPANYING RYAN STEVEDORING CO. v. PAN-ATLANTIC STEAMSHIP CORP.

Not satisfied with mounting costs occasioned by longshoremen's ship board injuries, ship owners turned in new directions to seek contribution by requiring employers of longshoremen to (1) give express agreements of indemnity or, (2) in the absence of express agreements, to press upon the courts the theory of implied warranties of workmanlike performance in the stowage of the ship's cargo.

It was in this posture, then that Pan-Atlantic Steamship Corporation (hereafter Pan Atlantic) was required to pay one Frank Palazzolo (hereafter Palazzolo), a longshoreman employee of Ryan Stevedoring Company (hereafter Ryan) for ship board injuries received by Palazzolo while un-

3. Under the Longshoremen's and Harbor Workers' Compensation Act.

4. Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, ch. 509, §33, 44 Stat. 1440; presently 33 U.S.C. §933.

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loading cargo negligently stowed by Ryan. Pan-Atlantic brought an action by third party complaint to recover the payments to Palazzolo and was successful. Palazzolo v. Pan-Atlantic S.S. Corp., 211 F.2d 277 (2d Cir. 1954).

Confident of the law as established in *Halcyon Lines* and *Pope & Talbot, Inc.*, Ryan petitioned for and was granted certiorari by the Supreme Court to clarify (1) whether the Longshoremen's and Harbor Workers' Compensation Act precluded such a shipowner's third party suit and (2) the status of indemnity both express and implied for breach of an obligation of a stevedore to stow cargo in a reasonably safe manner.

The Supreme Court in Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 244, 76 S.Ct. 232, 100 L.Ed. 133 (1956) found no impediments to such liability in the Longshoremen's and Harbor Workers' Compensation Act. Thus, the Court reasoned:

> While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractural obligation, voluntarily assumed to the shipowner, to load the cargo properly. The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third party complaint is grounded upon the contractor's breach of its purely consensual obligation owing *to the shipowner* to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not barred by the Compensation Act. *Id.* at 131-32, 76 S.Ct. at 236, 100 L.Ed. at 140-41. (emphasis in original) (citations omitted).

The rationale of the court in rejecting any proscription to third party suits in the Longshoremen's and Harbor Workers' Compensation Act[5] was that such claim was only a suit upon a contractual relationship (express or implied) between the shipowner and the stevedore and did not originate nor funnel to the shipowner through any right residing in an employee to recover for injuries caused by the negligence of his employer.

Having succeeded in their views of the equitable distribution of liability for the shipboard longshoremen injuries shipowners began almost universally to file third party complaints alleging the breach of express or implied warranty of workmanlike performance of stevedoring duties. Now employers became alarmed at the avalanche of third party suits brought by shipowners. Unsuccessful in the courts to stem the advancing tide of third party litigation, employers turned to Congress for relief.

THE NOW — AND THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AS AMENDED IN 1972

1972 found the Congress restudying the Longshoremen's and Harbor Workers' Compensation Act with two objectives in mind: 1. to increase the benefits to longshoremen for injuries sustained as a result of their employment; and

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5. The Court was concerned with Sec. 5 of the Longshoremen's and Harbor Workers' Compensation Act which provides in pertinent part:

> Sec. 5. The liability of an employer prescribed in Sec. 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case of death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death . . . 44 Stat. 1426, 33 U.S.C. §905.

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2. to review the tri-partite litigative relationship between employee - shipowner - employer created by the development of *Sieracki, Halcyon, Hawn,* to *Ryan.*

Amendments made effective November 26, 1972 now bring to the court for scrutiny the attempt of Congress to reconcile the problems of *Sieracki* and *Ryan* as applied to longshoremen's personal injury claims. These amendments contain what is a wholly new approach to this aspect of admiralty practice. Section 905(b) of the Act (33 U.S.C. §905(b)) was added to provide:

> "§905. Exclusiveness of liability.
>
> (a)***
>
> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

With the legislative history[6] indicating the view of Congress to change the existing benefits and procedures

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6. S. Rep. No. 1125 92d Cong. 2d Sess. 4 (1972); H. R. Rep. No. 1441, 92d Cong. 2d Sess. 4 (1972); 1972 U. S. Code Cong. & Admin. News 4698 et seq.

in longshoreman injury cases and to bring some order out of the chaos of third party practice the court must now draw some guidelines to reconcile the Congressional purpose with the equitable principles applicable to admiralty practice.

Defendant, USL presses upon the court the application of the so-called "Murray doctrine" announced by the Court of Appeals for the District of Columbia Circuit in Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968). The court in *Murray* considering the exclusivity of remedy provision of the Federal Employees' Compensation Act held that where the injuries to the employee were caused by some concurring negligence of the employer, the injured employee is only entitled to collect one-half of the damages from the third party tortfeasor. The rationale of *Murray* is indicated in this language of the Court:

> "Any inequity residing in the denial of contribution against the employer is mitigated if not eliminated by our rule in Martello v. Hawley, 112 U.S. App. D. C. 129, 300 F.2d 721 (1962). *Martello* holds that where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had 'bought his peace,' is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement. In our situation if the building owner is held liable the damages payable should be limited to one-half of the amount of damages sustained by plaintiff, assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar. A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in

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consequence of the employee's compensation Act, but that Act gave his assurance of compensation even in the absence of fault." *Id.* at 1365-66.

Murray cannot be applied here because in spite of the attempt of the court to reach an equitable result, the failure is obvious. *Murray* accomplishes its purpose only where (1) the negligence of the employer is 50%, and, (2) the compensation act recovery is 50% of what a judge or jury finds to be the actual damage suffered by the employees, and (3) no lien is allowed to an offending employer.

Also urged upon the court is the adoption of the holding in Carlson v. Pacific Far East Lines, 29 Cal. App. 3d 883, 105 Cal. Rptr. 885 (1973) in effect denying "double recovery" by the employee and defeating the employer's compensation lien where the employer's negligence is a concurring factor in the employee's injuries. The court in *Carlson* does, however, circumscribe the applicability of its principles to affect only state compensation lien actions. The court says:

> In those *federal* 'unseaworthiness' cases brought in *federal* courts, co-tortfeasor employers had paid workmen's compensation benefits to injured workmen under the *federal* Longshoremen's and Harbor Workers' Compensation Act (U.S.C.A., tit. 33 §901 et seq.). No contention was made that state law applied to those wholly federal actions, matters, and transactions. In each case the losing shipowner argued that the federal courts should adopt a rule of contribution similar to that later announced by California in *Witt* and *Jackson*. The United States Supreme Court declined to adopt such a rule. We recognize that the Court in *Pope & Talbot, Inc.*, held that application of the doctrine of contribution would frustrate the purpose of the Longshoremen's and Harbor Workers' Compensa-

> tion Act. But there again, understandably, the Court was defending the substantive rights of the parties under a federal statute, a consideration which as we have pointed out, has no application to the claim here at issue. *Id.* at 889-90, 105 Cal. Rptr. at 889-90.

Clearly *Carlson* and its adoption of Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961) has no direct application to longshoremen claims deriving their cause of action from the Longshoremen's and Harbor Workers' Compensation Act and prosecuting that claim in a federal court.

Considering the precedents, the statute and its legislative history some order may be made out of the position of the competing interests in this litigation.

1. SHELLMAN has a cause of action triable by jury for his claimed injuries caused by the negligence of USL (Longshoremen's and Harbor Workers' Compensation Act §905(B): 33 U.S.C. §905(b)).

2. MARINE and/or HARTFORD may not pursue its compensation lien claim against USL (Longshoremen's and Harbor Workers' Compensation Act §15 f-h; 33 U.S.C. §933(b)-(h), as now pleaded for the reason that SHELLMAN (the source of any statutory assignment) has filed suit against USL within six (6) months of the award of compensation.

If MARINE and/or HARTFORD have any direct action against USL it must arise on common law tort theory to which may be interposed a common law defense of contributory negligence. Either the contributory negligence of MARINE or of its employee SHELLMAN or both would be the measure[7] of recovery to be applied.

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7. Assuming comparative negligence because of the admiralty nature of the underlying claim.

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3. In the action of SHELLMAN against USL, USL may claim the contributory negligence of both SHELLMAN and MARINE in reduction of any damages SHELLMAN may be shown to have suffered as the result of some negligence on the part of USL.

This conclusion is compelled by the language of the Act, 33 U.S.C. §905(b):

> . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to its vessel.

4. No theory — statutory or otherwise — can — under the present state of the law — support the reduction of SHELLMAN'S claim against USL of any amount of compensation received by reason of the Longshoremen's and Harbor Workers' Compensation Act. The court rejects the "Murray Credit" principle because of its potential for injustice and rejects the *Carlson* case prohibition of "double recovery" because USL is adequately protected by the statutory provision permitting it to present evidence of the contributory negligence of SHELLMAN and MARINE (as set forth in paragraph (3) above).

An order shall be entered accordingly.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN SHELLMAN, *Plaintiff,* vs. UNITED STATES LINES OPERATORS, INC. *Defendant.*	No. CV 73-1902-R ORDER

IT IS ORDERED

1. The FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE of defendant UNITED STATES LINES OPERATORS, INC., is stricken.

2. The COMPLAINT IN INTERVENTION of HARTFORD ACCIDENT & INDEMNITY COMPANY is stricken.

Pre-Trial is now set for December 16, 1974 at 10:00 A.M.

Dated: November 21, 1974.

MANUEL L. REAL
United States District Judge

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN SHELLMAN, *Plaintiff-Appellant,* v. UNITED STATES LINES, INC., *Defendant-Appellee.*	No. 75-3071
HARTFORD ACCIDENT & INDEMNITY COMPANY, *Plaintiff in Intervention & Appellant,* v. UNITED STATES LINES, INC., & JOHN SHELLMAN, *Defendants in Intervention.*	No. 75-3058 OPINION

[NOVEMBER 21, 1975]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: BARNES and BROWNING, Circuit Judges and BURKE,* District Judge

BARNES, Senior Circuit Judge:

Plaintiff, John Shellman, a longshoreman employed by Marine Terminals Corporation [herein "Marine"], was injured while working aboard United States Lines' vessel, American Aquarius. Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, Shellman brought this third party action against defendant shipowner, United States Lines. Hartford Accident and Indemnity Company [herein "Hartford"], sub-

*Honorable Lloyd H. Burke, Northern District of California sitting by designation.

rogated to the rights of the stevedore employer Marine, filed a complaint in intervention seeking recovery of the compensation and medical benefits paid to Shellman under the Act by his employer. In its answer, United States Lines raised the contributory negligence of Marine as a defense to its liability both to Shellman and to Hartford.

This case is governed by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* The jurisdiction of this appeal is based upon 28 U.S.C. § 1291.

In a preliminary Memorandum Opinion and Order of November 25, 1974, District Judge Real found that Shellman had a cause of action for his asserted injuries caused by the negligence of shipowner, United States Lines (33 U.S.C. § 905(b)); that Marine and/or Hartford could not pursue their compensation lien against United States Lines; and that in the action of Shellman against United States Lines, the shipowner could claim both the contributory negligence of the longshoreman and his stevedore employer in reduction of any damages that the longshoreman could prove as the result of some negligence on the shipowner's part. (C.T. 10 to 22 inclusive.)

At trial, the stevedore employer was found seventy percent negligent, while United States Lines was found thirty percent negligent in causing Shellman's injuries. Shellman was found to be not contributorily negligent. Because of the seventy percent negligence of the stevedore employer, the district judge reduced Shellman's damages of $15,485.00 by such percentage, entering judgment in the amount of $4,645.50.[1]

Footnote [1]

We emphasize that the plaintiff longshoreman was held not contributorily negligent in any degree. We therefore are not called upon to pass upon any issue of comparative negligence between plaintiff and the shipowner. If he were, it is clear that the less harsh

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Both Shellman and Hartford appeal the decision of the district court.

Hartford, however, now seeks to voluntarily dismiss its appeal pursuant to the provisions of Rule 42(b) of the Federal Rules of Appellate Procedure. That Rule states in relevant part:

> *Rule 42. Voluntary Dismissal*
>
> *(b) Dismissal in the Court of Appeals.*
>
> If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. *An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.* (emphasis added)

Assuming that this Court grants Hartford's motion, Hartford stipulates that it will reimburse and pay to the

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doctrine of comparative, rather than contributory, negligence would apply. As the legislative history indicates: "[T]he Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury." 3 U.S. Code Cong. and Admin. News 4705 (1972). The case law has long been settled that the appropriate standard is one of comparative negligence. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408 (1953); *Arthur & Flota Mercante Gran Centro Americana, S.A.*, 487 F.2d 561, 563 (5th Cir. 1973); *Rivera v. Rederi A/B Nordstjernan*, 456 F.2d 970, 973 1st Cir. 1972); *McInnis v. Hamburg American Lines*, 317 F. Supp. 1395, 1397 (N.D. Cal. 1970). For a general discussion regarding the 1972 Amendments to the Act, including the savings of the comparative negligence doctrine, *see* Note, *The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 24 U. Miami L. Rev. 94, 105-06 (1972).

shipowner, United States Lines, all reasonable costs and attorneys' fees incurred by United States Lines in the preparation and other legal work incidental to its defense against Hartford on this appeal.

United States Lines objects to Hartford's motion, contending that a voluntary dismissal is improper where the case involves a recurrent controversy which the public has a strong interest in resolving. For authority, United States Lines cites *Alton & Southern Railway Co. v. International Association of Machinists*, 463 F.2d 872 (D.C. Cir. 1972), and *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911), which concern whether a court should dismiss an appeal as moot, or hear an apparently moot case, because of the strong public interest in resolution of the issues. They have no connection whatsoever with voluntary dismissal under Federal Rule of Appellate Procedure 42(b). We therefore do not find them of controlling value in resolving the issue at hand.

Although not directly applicable nor dispositive of this case, we find the comparable provisions of Supreme Court Rule 60(2) of assistance. That Rule provides:

> Whenever an appellant or petitioners in this court shall, by his attorney of record, file with the clerk a motion to dismiss a proceeding to which he is a party, with proof of service as prescribed by Rule 33, and shall tender to the clerk any fees and costs that may be due, the adverse party may within fifteen days after service thereof file an objection, *limited to the quantum of damages and costs in this court alleged to be payable*, or, in a proper case, to a showing that the moving party does not represent all appellants or petitioners if there are more than one. *The clerk will refuse to receive any objection not so limited.* (emphasis added)

Relating back to Federal Rule of Appellate Procedure 42(b), an appeal may be dismissed on appellant's motion

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"upon *such terms* as may be . . . . fixed by the court." The preceding language contained in Rule 42(b) [cited *supra*] and Supreme Court Rule 60(2) indicate that the word "terms" in Rule 42(b) refers to the payment of damages and costs alleged to be payable plus the payment of whatever fees are due.

Such an interpretation seems to be consistent with the Fourth Circuit's holding in *Blount v. State Bank & Trust Company*, 425 F.2d 266 (4th Cir. 1970). In *Blount*, the Court held that voluntary dismissal on appellant's motion under Rule 42(b) is unavailable when "the appellee has been put to trouble and expense because the appellant has not complied with the rules of court." *Id.* In other words, appellant will not be allowed to abandon its appeal if such would result in financial loss to the appellee. *Id; see also Moore v. Tangipahoa Parish School Board*, 421 F.2d 1407 (5th Cir. 1969); *Maryland & Virginia Milk Producers Association v. United States*, 193 F.2d 907 (D.C. Cir. 1951).

Rule 42(b) provides that the court *may* dismiss an appeal on appellant's motion, notwithstanding the "terms" agreed upon by the parties or which could have been arranged by the court. Such language indicates that the court has discretion in deciding whether to dismiss an appeal on appellant's motion under Rule 42(b). Thus, circumstances may arise which demand, in the interests of justice, that this court deny appellant's motion to voluntarily dismiss. There has been no showing that such circumstances are present here, however, and we therefore need not further explore this discretionary area. *See generally Blue Moutain Construction Co. v. Werner*, 270 F.2d 305, 306 (9th Cir. 1959).

We therefore grant Hartford's motion under the provisions of Federal Rule of Appellate Procedure 42(b) for the voluntary dismissal of its appeal, and order Hartford to pay to United States Lines all reasonable costs and attor-

neys' fees incurred by United States Lines in the preparation and other legal work incidental to its defense against Hartford on this appeal.[2]

Footnote [2]

By granting Hartford's motion to voluntarily dismiss its appeal, we need not discuss United States Lines' assertion that the concurring negligence of the stevedore employer in causing the longshoreman's injuries should result in a *reduction*, rather than a *total denial*, of the stevedore's [here Hartford's] recovery of its compensation lien by the percentage of the stevedore's negligence. Because this argument as to *reduction* was not raised in *Dodge* v. *Mitsui, et al.*, No. 75-1442, we did not consider it there. We believe, however, that our decision in Dodge is dispositive of the shipowner's claim here. ... F.2d ... (9th Cir. 1975).

The shipowner's contention is based on the premise that the employer's right of reimbursement is an equitable one. Being an equitable right, "[t]here is no equity in the principle that a stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence." *Croshaw* v. *Koninklijke Nedlloyd, B.V. Rijswijk*, Civ. No. 74-250, 398 F. Supp. 1224, 1234 (D. Ore. July 31, 1975). Accordingly, the shipowner contends that the stevedore's lien should be reduced in proportion to its negligence.

Call the lien what we may, equitable or legal, the reduction of the stevedore's recovery would simply be another form of contribution which the Act seeks to prohibit. The Supreme Court in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full. The Court noted "reduction of [the shipowner's] liability at the expense of [the stevedore company] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case." 346 U.S. at 412. In a recent case, the Second Circuit held that the rule stated in *Pope & Talbot* is still good law, *Landon* v. *Lief Hoegh and Co.*, No. 74-2304, 521 F.2d 756, 760 (2nd Cir. June 18, 1975).

If the employer pays the compensation without an award, then his lien is not under § 33(b) of the Act but is rather judicially created. *See Allen* v. *Texaco, Inc.*, 510 F.2d 977, 979-80 (5th Cir. 1975); *Fontana* v. *Pennsylvania R.R.*, 106 F. Supp. 461, 462-63 (S.D. N.Y. 1952), *aff'd sub. nom., Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2nd Cir.), *cert. denied*, 346 U.S. 886 (1953); *The Etna*, 138 F.2d 37, 41 (3rd Cir. 1943). This mode of recovery, however, should not alter the result that the employer may recover his compensation lien in full. See *Metropolitan Stevedore Co.* v. *Dampskisaktiesclskabet International*, 274 F.2d 875 (9th Cir.), *cert.*

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Next, we turn to the plaintiff Shellman's appeal. Shellman contends that the district court was in error when it reduced his damages from $15,485.00 to $4,645.50, due to the seventy percent concurring negligence of his stevedore employer. The principle which the district judge advanced in announcing his decision has become known as the *Shellman* Doctrine: The plaintiff's recovery will be reduced by the percentage of his own contributory negligence *plus* the percentage of the stevedore employer's concurring negligence. *See Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, Civ. No. 74-250, 398 F. Supp. 1224 (D. Ore. July 31, 1975). This standard is somewhat similar to that advanced in *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968), better known as the *Murray* Credit Doctrine, which states that where plaintiff's injuries are caused by the concurring negligence of the stevedore, he is entitled only to receive one-half of the damages from the negligent shipowner.

In support of the rule announced in *Shellman*, United States Lines argues (1) that the longshoreman's principal remedy under the Act is a liberal compensation program; (2) that he is entitled to sue the third party for negligence;

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denied, 363 U.S. 803 (1960). The purpose of this Act would be frustrated if a different result could be reached merely because the employer pays compensation without entry of a formal award. *See Louviere v. Shell Oil Company*, 509 F.2d 278, 283-84 (5th Cir. 1975). As stated by the Supreme Court, the shipowner is not entitled to contribution against the stevedore *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282, 284-85 (1952). Permitting him to retain such portion of the lien would be tantamount to contribution. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 412 (1953). The 1972 amendments to the Act do not effect this result. *See Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 112-13 n. 6 (1974). Contribution is still prohibited and any indirect method to accomplish the same result is also prohibited. *Landon* v. *Lief Hoegh and Co., Inc.*, No. 74-2304, 521 F.2d at 760 (2nd Cir. June 18, 1975). We therefore believe that the stevedore employer, even though concurrently negligent, has a right to reimbursement for its expenditures made under the Act regardless of whether it has paid the compensation under an award or has paid the amount without such an award.

and (3) that the legislative history indicates that "[t]he vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." 3 U.S. Code Cong. and Admin. News 4704 (1972). Hence, United States Lines asserts that it is only liable to the extent of its own negligence.

As additional authority, United States Lines cites *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk,* Civ. No. 74-250, 398 F. Supp. 1224 (D. Ore. July 31, 1975). Judge Skopil, upon reviewing the effect that the 1972 amendments have had on the Act, observed:

> At first blush, then, the 1972 amendments seem to contain a "catch 22." Shipowners are not to be liable for negligence of the stevedore, the stevedore cannot be held liable for it either, but the injured plaintiff is entitled to damages for it. No explicit remedy for this paradox is provided by the Act. 398 F. Supp. at 1232.

Although Judge Skopil conformed his ruling to Chief Judge Belloni's decision in *Hubbard v. Great Pacific Shipping Co.*, Civ. No. 74-298, ... F. Supp. .... (D. Ore. June 16, 1975), holding that a vessel owner is not entitled to any offset in relation to the stevedore's concurring negligence, he suggested the better rule would be that "[t]he shipowner's liability [be] reduced by the percentage of the stevedore's negligence, as well as that of the plaintiff." 398 F. Supp. at 1233. Hence, Judge Skopil's suggestion is in agreement with Judge Real's ruling in *Shellman.*

Thus, it is clear that the Act's intent is to absolve the shipowner from liability for negligence on the part of the stevedore. But it is equally clear that the injured plaintiff is entitled to recover the full amount of his damages. Chief Judge Belloni's opinion in *Hubbard* is helpful:

> The defendant-shipowner's two partial theories [*Murray* Credit and *Shellman*] would have the result of ne-

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> gating Congress' intent of eliminating direct or indirect third-party actions in longshoreman-injury cases as embodied in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. This is simply a case of *concurring* negligence of the defendant-shipowner and the stevedore, which, under a negligence theory, still entitles the plaintiff to a judgment against the defendant-shipowner in the *full* amount of his damages. .... F. Supp. at ..... (emphasis added)

Hence, the shipowner here is not charged with the negligence of the stevedore. Rather, because the shipowner's negligence was a concurring cause in producing the longshoreman's injuries, the shipowner is liable for the total of the plaintiff's damages.

We therefore reject both the *Murray* Credit and *Shellman* Doctrines because they are contrary to the weight of authority and because they impose unjustified burdens upon the injured longshoreman. The Second Circuit very recently considered this problem, observing: "We cannot agree that some negligence by the employer is enough to cut off the injured longshoreman's protected right to sue the ship for its own negligence." *Landon* v. *Lief Hoegh and Co., Inc.*, No. 74-2304, 521 F.2d 756, 763 (2nd Cir. June 18, 1975). The *Murray* Credit Doctrine has also been criticized by commentators. *See, e.g.*, Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation,* 19 N.Y.L.F. 587, 594 (1974).

Another important decision, rendered by a panel composed of three district judges, held that the recovery of an injured longshoreman against a negligent shipowner was not to be diminished by the concurring negligence of the stevedore employer. *Lucas* v. *"Brinkness" Schiffahrts Ges.*, 379 F. Supp. 759, 769 (E.D. Pa. 1974). *In accord,*

Hubbard v. *Great Pacific Shipping Co.*, Civ. No. 74-289, ... F. Supp. .... (D. Ore. June 16, 1975); *Solsvik* v. *Maremar Compania Naviera, S.A.*, No. C75-186S, *399* F. Supp. *712* (W.D. Wash. August 6, 1975).

In another recent case, *Santino* v. *Liberian Distance Transports, Inc.*, No. 524-73C2, ... F. Supp. .... (W.D. Wash. June 2, 1975), District Judge Voorhees agreed with the rationale of the *Lucas* court. In holding that an employee injured by the concurring negligence of the stevedore employer and the vessel owner can recover "the *total* of his damages from the shipowner," the court made the following remarks:

> On its face it seems inequitable for a shipowner to be liable to an injured longshoreman for all of the latter's damages if the negligence of the shipowner was not the sole proximate cause of the injuries but rather concurred with the negligence of the stevedore employer. Particularly would this be true if the fault of the stevedore employer were much greater than that of the shipowner. Nevertheless, since the Longshoremen's and Harbor Workers' Act is a creature of Congress, it would in this Court's opinion be better for Congress to effect the elimination of any inequity than to have the various District Courts seek to remove that inequity by means which would unavoidably vary from district to district.
>
> Permitting a shipowner to plead the negligence of the stevedore as an affirmative defense would not eliminate inequity. *It would shift the inequity from shipowner to injured longshoreman. He would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against the stevedore employer.* .... F. Supp. at .... (emphasis added).

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We agree with this rationale. To reduce plaintiff Shellman's recovery here because of the concurring negligence of his stevedore employer, would simply shift the inequity from defendant United States Lines to Shellman. Futhermore, the Supreme Court clearly emphasized in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1952), that it is for Congress and not for the courts to create a solution to this problem. We therefore hold that a longshoreman who has received injuries caused by the concurring negligence of his stevedore employer and the shipowner can recover the full amount of his damages from the shipowner.

We therefore reverse the district court's reduction of plaintiff John Shellman's damages from $15,485.00 to $4,645.50, and, remand for the entry of judgment in favor of Shellman against United States Lines in the amount of $15,485.00.

With respect to Hartford's motion to voluntarily dismiss its appeal, as stated above, we grant that motion, and order counsel for appellee United States Lines to submit its bill of costs to the clerk of this Court within fourteen days, and appellant Hartford may file opposition thereto, within seven days thereafter. If no opposition is filed, costs are to be entered upon the mandate being issued to the lower court.

Supreme Court, U. S.
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FEB 13 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1121

UNITED STATES LINES, INC.,
Petitioner,

vs.

JOHN SHELLMAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PACIFIC MERCHANT SHIPPING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
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OCTOBER TERM, 1975

No. 75-1121

UNITED STATES LINES, INC.,
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JOHN SHELLMAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PACIFIC MERCHANT SHIPPING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF PACIFIC MERCHANT SHIPPING ASSOCIATION

Amicus curiae, Pacific Merchant Shipping Association, is a voluntary association of American steamship companies[1] conducting major operations and, in most in-

[1]Alaska Hydro-Train (a division of Crowley Maritime Corporation), American President Lines (including American Mail Line), Matson Navigation Company, Pacific Far East Lines, Inc., Prudential-Grace Lines, Inc., States Steamship Company, and United States Lines, Inc.

stances, having their headquarters on the West Coast and within the Ninth Circuit. They are exposed to injury claims of longshoremen and engaged in frequent litigation of such claims in the federal district courts of the Ninth Circuit and other maritime circuits and may be considered representative of numerous other American steamship companies also involved in such litigation.

United States Lines, Inc. v. Shellman, No. 75-1121, October Term, 1975, and *Mitsui Shintaku Ginko K.K., Tokyo v. Dodge and Brady-Hamilton Stevedore Co.*, No. 75-1058, October Term, 1975, raise important questions concerning the meaning of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Those Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoremen and vessel or between vessel and stevedore, and, consistently with that aim, provided dramatic but much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. As in the past, members of the Association now pay the resulting higher premiums for such insurance, so far as the premiums are attributable to the stevedoring of their own vessels, as a distinct element of the rates which they pay to their stevedore contractors.

The Association and its members are keenly interested in interpretations of the Act which will result in achieving the broad purposes of the 1972 Amendments by providing longshoremen with the ample benefits and long-term security which the Act provides, unburdened by a heavy over-

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lay of attorneys' fees; by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating numerous costly and confusing problems in the past administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably determined in accordance with the overall aims of the Amendments and current views on the distribution of loss.

REASONS FOR GRANTING THE WRIT

We concur with the petitioner that the case presents an important question of federal law which has not been but should be settled by this Court for the reasons stated in the petition, the reiteration of which we would spare the Court here. We would add, however, some figures suggesting the number of cases affected by the disposition of the question. The seven members of this Association had pending against them, as of December 31, 1975, a total of 216 lawsuits for injuries to longshoremen and harbor workers occurring since November 26, 1972, and therefore subject to 33 U.S.C. §905(b), the new subsection effective as of that date which the Court is asked by the petitioner to construe in this case. Most such cases involve the issue of stevedore negligence and the questions raised by petitioner here. It may be assumed that the many other steamship companies operating in United States ports have similar numbers of such claims pending against them. In all such cases, whatever the Court of Appeals may have said below, it is necessary to litigate such questions until they are finally settled by this Court. The volume

of the litigation and the number of parties and suits involved in uncertainty pending final decision by this Court go far, we submit, to establish the importance of the question.

We also concur with petitioner that the decision below is in conflict with the decisions of other Courts of Appeals, in particular the decisions in *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972), *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968) and *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 37 (3rd Cir. 1975). We also concur that the decision is contrary to the implications of this Court's decision in *United States v. Reliable Transfer Co.*, ... U.S. ....., 1975 A.M.C. 541 (1975).

Unfortunately, the Court of Appeals for the Ninth Circuit, while deciding what should be the outcome of this case, contributed almost nothing to the settlement of the question involved for the nation as a whole, despite excellent briefing of all points of view and a combined oral argument of the *Shellman* and *Dodge* cases in which nine counsel were heard and the questions presented by the petition here were strongly urged and ably discussed. The Court of Appeals opinion failed to acknowledge the central question presented by the petition here, which has to do with the interpretation of §905(b); gave that section, upon which the whole case turns, no explicit analysis whatever; and decided the case by an opinion which would seem to deal with the case as one arising prior to the enactment of the section.

Because of the importance of the questions presented here in so many cases below and to so many parties, they

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should be settled definitively and early. But more than that, they should, in our view, be settled on a basis broader than the disposition of a single case or group of cases. The Longshoremen's and Harbor Workers' Compensation Act has given rise to a great many nagging problems in the courts in its fifty-year history, of which the distribution of risks between vessel owner and stevedore employer is only one. The 1972 Amendments to the Act have explicitly dealt with some of these problems, notably by dramatically increasing compensation benefits, by adjusting geographical scope of coverage and by eliminating the warranty of seaworthiness and the recovery of indemnity against an employer.

Other problems not explicitly solved, however, involve whether employer, employee or both may sue the vessel owner as third party in certain circumstances;[2] differences in treatment of longshoremen from the treatment of the majority of the employees covered by the Act,[3] as well as employees covered by the companion Federal Employees' Compensation Act;[4] vagueness about the employer's recoupment of compensation benefits out of the third party damages when suit is brought by the employee rather than the employer;[5] uncertainty as to whether the

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[2]See *Czaplicki v. Hocgh Silvercloud*, 351 U.S. 525, 1956 A.M.C. 1465 (1956); *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd.*, 394 U.S. 404, 1969 A.M.C. 745 (1969).

[3]Compare *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972).

[4]Compare *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968).

[5]See *The Etna*, 138 F.2d 37, 1943 A.M.C. 1126 (3rd Cir. 1943); *Fontana v. Pennsylvania R.R. Co.*, 106 F.Supp. 461, 1952 A.M.C. 1535 (S.D.N.Y. 1952), aff'd, 205 F.2d 151, 1953 A.M.C. 1258 (2d Cir. 1953) and cases there cited.

vessel owner has an obligation to protect the employer's interest in such recovery;[6] and disparate treatment of the deduction of attorneys' fees in the allocation of recovery where the employee rather than the employer sues the third party.[7] We believe that all of these questions are related in principle and that the questions raised here should be not only settled early but settled in a manner which does not aggravate other problems but advances their solution by resting decision upon a sound principle with all such problems in mind.

We have advocated such a position in the Court of Appeals. We agree in the main with the position of the petitioner, although not necessarily in all details, and are interested in seeing that the Court is presented with a broader view of the field of litigation relative to the Act involved and with views other than our own and other than those of the District Court in *Shellman*, in the hope that this Court will not only decide this case but do so upon a sound and equitable basis which will dispose of other related but dissimilar cases hereafter. To this end, if certiorari is granted, we will seek to file a brief *amicus curiae* upon the merits.

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[6]Compare *International Terminal Operating Co., Inc. v. Waterman Steamship Co.*, 272 F.2d 15, 1960 A.M.C. 306 (2d Cir. 1959) with *Jarka Corp. of New England v. United States Lines Co.*, 387 F.2d 436, 1968 A.M.C. 487 (1st Cir. 1967).

[7]Compare *Chouest v. A&P. Boat Rentals*, 472 F.2d 1026, 1973 A.M.C. 1542 (5th Cir. 1973) and *Scozzari v. Jade Co., Inc.*, 350 F.Supp. 801, 1973 A.M.C. 1886 (E.D.N.Y. 1972) with *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345, 1966 A.M.C. 2024 (5th Cir. 1966); *Russo v. Flota Mercante Grancolombiana*, 303 F.Supp. 1404, 1969 A.M.C. 2096 (S.D.N.Y. 1969) and *Riddick v. Rederi A/B Fredrika*, 271 F.Supp. 360, 1967 A.M.C. 1808 (E.D.Va. 1967).

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CONCLUSION

For the foregoing reasons, we pray that the petition for a writ of certiorari be granted.

Dated, January 30, 1976.

Respectfully submitted,

GRAYDON S. STARING,

Attorney for Pacific Merchant Shipping Association as Amicus Curiae.

LILLICK MCHOSE & CHARLES,

Of Counsel.

SUPREME COURT, U. S.

FEB 18 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1121

UNITED STATES LINES, INC.,

Petitioner,

v.

JOHN SHELLMAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1121

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Petitioner.

v.

JOHN SHELLMAN,

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Interest of American Institute of Merchant Shipping

Amicus Curiae, American Institute of Merchant Shipping, referred to as AIMS, is a voluntary association which was formed in 1969 by merger of three shipping associations—the American Merchant Marine Institute, the Committee of American Steamship Lines and the Pacific American Steamship Association. It represents the nation's largest association of American flag shipowners.

AIMS and its members, composed of over 30 companies operating over 400 ships registered under the U. S. flag, respectfully submit that the issues involved in *Mitsui Shintaku Ginko K.K., Tokyo* v. *John Dodge and Brady-Hamilton Stevedore Co.*, No. 75-1058, October Term, 1975 and its companion case, *United States Lines, Inc.* v. *John Shellman*, No. 75-1121, October Term, 1975 decided by the Ninth Circuit at the same time on November 21, 1975, are of real and vital concern to the shipping industry.

These cases involve a recurrent controversy which AIMS and its members have a strong interest in resolving. The members of AIMS are confronted with claims and suits involving the issues presented by *Dodge* and *Shellman*. These issues concern the effect of substantial negligence by a harbor worker's employer under the *Longshoremen's and Harbor Workers' Compensation Act* (33 U.S.C. § 905, as amended Oct. 27, 1972, Pub. L. 92-576, § 18 (a), 86 Stat. 1263) on (a) the harbor worker's recovery of damages against the shipowner; and (b) the negligent employer's recovery of compensation benefits paid to the harbor worker.

These issues necessarily involve construction of the 1972 amendments to the Longshoremen's Act. They have remained unresolved by this Court, although they surely will frequently recur in cases both in the Federal and State courts.

The Ninth Circuit below recognized the similarity of the issues presented in these cases, when it consolidated the cases for oral argument and decided them together. Accordingly, the brief by AIMS as *amicus curiae* in *Dodge* will not differ materially from the one filed in *Shellman*. Filing of this brief *amicus curiae* was consented to by all parties in *Shellman* but in *Dodge* plaintiff-respondent refused to consent. This explains why the motion seeking

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leave to file the brief has been made in *Dodge* but not in *Shellman*.[1]

Reasons for Granting the Writ

AIMS concurs in the reasons given by petitioners in *Dodge* and *Shellman*, and by Pacific Merchant Shipping Association as *amicus curiae*, for the granting of the writ of certiorari. AIMS supplements these reasons below, and also advances additional reasons why certiorari should be granted.

The Ninth Circuit when it granted a preference to the hearings in *Dodge* and *Shellman* realized that they presented important issues which will recur. This was again impliedly affirmed in the *Shellman* decision where the Ninth Circuit allowed a voluntary dismissal of the employer's appeal although it presumed the case involved "a recurrent controversy which the public has a strong interest in resolving". (*Shellman* petitioner's appendix, p. A16). Denial of certiorari, which is not on the merits will not put these recurring issues to rest but will invite further litigation and appeals leading to petitions for a writ of certiorari in order to obtain a resolution on the merits. This is clearly indicated by the fact that petitions in several cases (not only the instant cases of *Dodge and Shellman*, but also in A/S Arcadia, discussed below), involving writs seeking certiorari based on these issues, have been filed in this October, 1975 Term.

On January 12, 1976 this Court denied certiorari in *A/S Arcadia* v. *Gulf Insurance Company*, No. 75-646 October Term, 1975, decided by the Second Circuit *sub nom. Landon* v. *Lief Hoegh and Co., Inc.*, 521 F. 2d 756. *A/S*

[1] The stipulation consenting to the filing of the *amicus curiae* brief in Shellman is annexed as appendix A.

Arcadia, however, involved an interlocutory appeal, as the opinion of the Second Circuit states at 521 F. 2d at p. 763: "Appellant's second argument that the plaintiff may not recover against the shipowner unless he proves that the ship's negligence was *solely* responsible for his injury is strictly not before us on this interlocutory appeal." The only question directly presented to the Second Circuit was whether the stevedore or its insurer was an indispensable or necessary party pursuant to Rule 19 F.R.C.P. in the suit brought by the injured longshoreman against the shipowner (521 F. 2d at p. 761). The Second Circuit held that the litigation between the injured longshoreman and the shipowner could properly proceed in "the employer's absence" and that "complete relief can be accorded among those already parties" (521 F. 2d at p. 761); accordingly it held that the employer or its insurer was not an indispensable or necessary party. Obviously in *A/S Arcadia* there was no finding or even proof of negligence by the stevedore to any degree. Here, however, final judgments are involved, the negligence of the employers has been adjudicated and found to be a substantial factor in causing the injuries to the longshoremen. In *Dodge* and *Shellman*, the issues are squarely presented, therefore, as to whether the decisions of the Ninth Circuit have resulted in an inequitable apportionment of responsibility among the parties based on this adjudicated negligence.

The question raised by the Ninth Circuit as to the inequity in allowing a substantially negligent employer full recovery of its compensation payments also make the *Dodge* and *Shellman* cases particularly appropriate for review by this Court. This inequity was acknowledged in *Dodge* where the Ninth Circuit said at footnote 1:

> "It is indeed questionable whether it is equitable for the stevedore employer to recover the full amount of

its compensation payments even if its negligence were a concurring cause of the longshoreman's injuries". (*Dodge* petitioner's appendix, p. A 10).

Despite this inequity the Ninth Circuit believed it was obligated to follow language used by this Court in older cases which did not involve the 1972 amendments to the Longshoremen's Act, and which were decided before the right of full indemnity by the shipowner against the employer was abolished by the amendments. This Court should be the forum to make this pronouncement, and by granting certiorari it will be enabled to state authoritatively whether it intends the rationale of the prior decisions to remain the law under the new amendments even though the result proves inequitable.

CONCLUSION

It is respectfully submitted that the Court should grant the petition for a writ of certiorari.

Dated: New York, New York
February 17, 1976

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

JOHN SHELLMAN,

Plaintiff-Respondent

vs

UNITED STATES LINES, INC.

Defendant-Petitioner

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Plaintiff in Intervention

vs

UNITED STATES LINES, INC. and JOHN SHELLMAN,

Defendants in Intervention

STIPULATION FOR FILING OF AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The parties stipulate that the American Institute of Merchant Shipping may file an amicus curiae brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in JOHN SHELLMAN v. UNITED STATES

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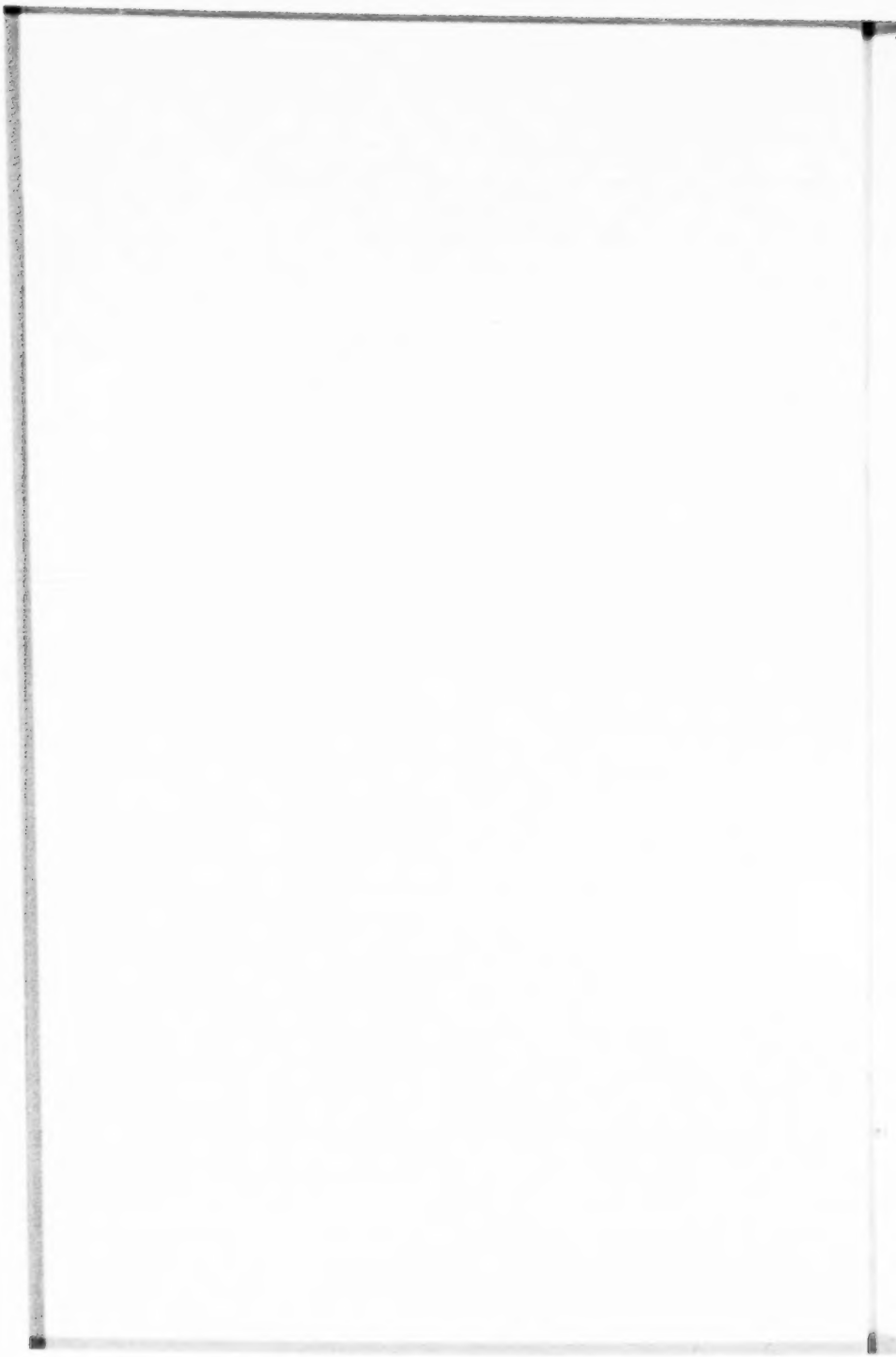
Appendix A



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LINES, INC., No. 75-3071 vs. HARTFORD ACCIDENT & INDEMNITY COMPANY v. UNITED STATES LINES, INC. and JOHN SHELLMAN, No. 75-3058.

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KILLICK McHOSE & CHARLES

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Robert Sikes
Attorney for Intervenor

Dated: January 23, 1976

POOR COPY

Supreme Court, U. S.
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MAR 30 1976
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In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 75-1121

UNITED STATES LINES, INC.,

Petitioner,

v.

JOHN SHELLMAN,

Respondent.

BRIEF OF RESPONDENT SHELLMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(2) The "apparent internal inconsistency" question and argument concerning 33 USC § 905(b) made by Petitioner was not raised or argued below, and no such inconsistency exists. 6

(3) The decision of the Court of Appeals was correct. The overruled decision of the District Court would permit fault-free plaintiff to be denied recovery of part of his damages against a defendant because of negligence of fellow employees 9

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I N T H E S U P R E M E C O U R T

OF THE UNITED STATES

October Term, 1975

No. 75-1121

UNITED STATES LINES, INC.

Petitioner

vs.

JOHN SHELLMAN,

Respondent

BRIEF OF RESPONDENT SHELLMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Shellman prays that the Petition for Writ of Certiorari be denied.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

(1) The ruling of the Court of Appeals is in accord with virtually all reported cases and with the plain meaning of 33 USC § 905(b).

The Court of Appeals in this case rejected

> "both the Murray Credit and Shellman Doctrines because they are contrary to the weight of authority and because they impose unjustified burdens upon the injured longshoreman." (App. A21)

The Petition for Certiorari, however, claims (p. 6) that the lower court decisions on this subject thus far have reached "varying results." In fact, almost every reported decision since the enactment of § 905(b) in 1972 reaches the same result as the Court of Appeals for the Ninth Circuit in this and the companion Dodge v. Mitsui case. Lucas v.

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"Brinknes" etc., 379 F.Supp. 759 (E.D.Pa., 1974); Landon v. Lief Heogh and Co., Inc., 521 F.2d 756 (C.A. 2, 1975), cert. den.; sub nom. A/S ARCADIA v. Gulf Insurance Co., ___ US ___, 44 US Law Week 3398 (1/12/76);[1] Hubbard v. Great Pacific Shipping Co., 404 F.Supp. 1242 (D. Or. 1975); Croshaw v. Koninklijke, etc., 398 F.Supp. 1224 (D. Or. 1975); Santino v. Liberian Distance Transports, Inc., 405 F.Supp. 34 (W.D. Wash., 1975).

The only "varying results" in reported decisions to date are those of the District Court in this case (1975 AMC ~~1130~~ 362), and a brief, verbal decision of Judge Blair in Frasca v. Prudential Grace Lines, 1975 AMC 1130, 1143 (D. Md., 1975), expressly following the now-overruled Shellman

[1]The Lucas and Landon cases are not cited among the cases "petitioner's counsel knows of" in footnote 1 of the Petition for Certiorari, p. 6.

District Court decision.

Thus, the lower court rulings are almost uniformly in accord with the decision of the Court of Appeals for the Ninth Circuit in this case that Congress in enacting the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 USC § 905(b), did not intend to reduce an injured longshoreman's recovery of damages against a third party vessel because of concurrent negligence of fellow longshoremen. There is no evidence that Congress in § 905(b) meant to alter or overrule Pope & Talbot, Inc., v. Hawn, 346 US 406 (1953), in which this Court refused to permit such diminution of damages sustained by an innocent longshoreman.

Petitioner's claim that the decision below conflicts with those of other Courts of Appeals is most tenuous. The passage

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in Murray v. U.S.,405 F.2d 1361 (C. A. D.C., 1968), relied on by Petitioner is ill-considered dictum, which fails even to mention the employer's rights to recover compensation payments out of any judgment obtained by the injured workman against a third party. As noted in subsequent cases in the District of Columbia Circuit, the Murray dictum ignores the undisturbed decision in Randall v. U.S., 282 F.2d 287 (C. A. D.C. 1960), cert. den. 365 U.S. 813, holding that a concurrently negligent employer may recover its compensation payments out of an employee's judgment against a concurrently negligent third party. See Dawson v. Contractors Transport Corp., 467 F.2d 727, fn. 3 (C. A. D.C., 1972), and Turner v. Excavation Construction, Inc., 324 F.Supp. 705 (D.C. D.C., 1971).

Petitioner's claim that the decisions of the Court of Appeals in this and in the Dodge case conflict with Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (C.A. 3, 1975), and U.S. v. Reliable Transfer Co., Inc., ___ US ___, 44 L.Ed.2d 251 (1975), is obviously wrong. Neither of those decisions decided any issue involved in the Shellman and Dodge cases.

(2) The "apparent internal inconsistency" question and argument concerning 33 USC § 905(b) made by Petitioner was not raised or argued below, and no such inconsistency exists.

Petitioner's statement of the Questions Presented and argument for granting the writ claim that there is an "apparent internal inconsistency" in 33 USC § 905(b) (Pet. pp. 2, 8-10.) Petitioner argued that if the phrase "caused by the negligence of

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a vessel" means that a longshoreman can recover all his damages from a third party vessel owner whose negligence was only concurrent, then the same phrase in the second and third sentences of § 905(b) means that a longshoreman would be barred from any recovery against his employer as a vessel owner if negligence of fellow longshoremen was a concurrent cause of the injury.

No such argument was made to the Court of Appeals by Petitioner or amici curiae supporting Petitioner. It is not, therefore, surprising that the decision of the Court of Appeals did not engage in "textual analysis" (Pet. p. 8) of § 905(b) to rebut such an argument.

Moreover, the "apparent internal inconsistency" of the first sentence of § 905(b) with the second and third sentences is nonexistent. It is plain from § 905 (b)

itself that Congress intended to preserve the right of an injured longshoreman to sue his employer as vessel owner for a negligently-caused injury, if the negligent employees were not his fellow longshoremen. Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (C.A. 3, 1975).

If Congress had simply phrased the second and third sentences of § 905(b) in the affirmative, as it did the first sentence, the lack of any inconsistency would be even plainer. Put affirmatively, the second sentence of § 905(b) would read:

> "If such person was employed by the vessel to provide stevedoring services, then an action shall be permitted if the injury was caused by negligence of persons not engaged in providing stevedoring services to the vessel."

No different meaning was intended by Congress stating the same thing negatively, as the second sentence of § 905(b)

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actually reads:

> "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

(3) The decision of the Court of Appeals was plainly right. The overruled decision of the District Court would permit a fault-free longshoreman to be denied recovery of part of his damages against a vessel owner because of negligence of fellow employees.

The District Court decision in this case, overruled by the Court of Appeals, expressly required an innocent longshoreman to suffer a reduction of his damage verdict against a third party vessel owner in proportion to the degree of concurrent negligence of fellow longshoremen employed by the same stevedore employer (1975 AMC at 369-370). At the subsequent trial of the Shellman case, the jury found Shellman

guilty of no contributory negligence, and that his injury was caused 30% by negligence of the vessel and 70% by negligence of his fellow longshoremen. Accordingly, the District Court entered a judgment reducing Shellman's damages by 70% from $15,485 to $4,645.

The District Court's opinion and decision are unclear as to whether the Court regarded Shellman as obligated to repay his employer out of his recovery the $7,475 in compensation and medical benefits he received under the Act. If Shellman was so obligated, his net recovery against the vessel of $4,645 (after the 70% reduction) was obviously less than his benefits under the Act. If he was not obligated to reimburse the employer's lien or payments made under the Act, Shellman's gross recovery on account of his injury was the $4,645 he

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recovered from the vessel owner plus the $7,475 in benefits under the Act, for a total of $12,120. That sum is $3,365 (about 21.5%) less than the $15,485 in damages Shellman was entitled to recover from the vessel owner.

These results are plainly unconscionable. Injured longshoremen should not be denied recovery of the damages which they were entitled to recover against third party vessel owners before and after the 1972 amendments to the Act, by reason of what amounts to an application of the fellow servant rule, which has long been rejected in admiralty. Spinks v. Chevron Oil Co., 507 F.2d 216, 222 (C.A. 5, 1975).

The same point is made in 2 Larson, Workmen's Compensation Law (1975 Rev.) § 76.22, discussing a case in which an innocent longshoreman would have suffered diminution of $16,400 in his recovery

against the third party vessel owner due to the fault of fellow employees. Larson continues:

> "By what conceivable logic can he [the injured longshoreman] be told that he should absorb a loss of $16,400 for the benefit of the third party tortfeasor?
>
> "A rule capable of producing such a result is clearly unacceptable, particularly since its legal underpinnings are just as unsound as its practical result."

As the Court of Appeals correctly perceived in this case, the erroneous decision of the District Court imposed "unjustified burdens upon the injured longshoreman." (App. A21) If there is inequity in § 905(b) as to the present allocation of damages between a negligent vessel owner and a concurrently negligent stevedore, no greater

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fairness results from shifting any such inequity from the vessel owner to the injured longshoreman.

Respectfully submitted,

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